SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE
RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE
TENNESSEE VALLEY AUTHORITY

Appellants

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appellees

PETITION FOR REHEARING

The appellants in the above-styled cause petition the Court for rehearing on the following grounds:

This case involves an order of the Interstate Commerce Commission which increased the intrastate rates on certain movements of coal, and also on pulpwood, within the State of Tennessee. The Tennessee Valley Authority introduced substantial and uncontradicted evidence at the hearing before the Interstate Commerce Commission that

the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost, but the Interstate Commerce Commission made no finding as to the relative levels of the interstate and intrastate rates.

The basic contentions of the appellants are, first, that the Interstate Commerce Commission lacks the statutory authority to compel intrastate rates to be raised above the level of interstate rates under the guise of removing an alleged discrimination against interstate commerce, and second, that the Interstate Commerce Commission was required by section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. sec. 1007(b)) to make a finding as to the relative level of interstate and intrastate rates, this being one of the "material issues of fact . . . presented on the record." That these were the issues in the case seems not to have been understood by the District Court since it did not pass on either of them. Neither issue is even mentioned in the findings of fact and conclusions of law. This is not the usual case, therefore, in which this Court has the benefit of the consideration given to the issues by the court below. *Cf. United States* v. *Ballard*, 322 U. S. 78, 88; *United States* v. *Sheridan*, 329 U. S. 379, 392.

The decision of this Court granting the motion to affirm must mean either that the Interstate Commerce Commission has the power to compel intrastate rates to be raised above the level of interstate rates so that they will provide a greater proportionate share of the railroads' revenues than do corresponding interstate rates, or that even though the Interstate Commerce Commission has no such power the issue is not one on which it was required to make a finding.

If the decision means that section 13 of the Inter-

state Commerce Act (41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U. S. C. sec. 13) grants the Commission authority to require that intrastate rates provide a greater proportionate share of the railroads' revenues than do the corresponding interstate rates, we submit that this is a novel proposition of law which should not be adopted without full consideration on a complete record that has been adequately briefed and argued.

If the correct interpretation of the Court's decision is that the Interstate Commerce Commission did not need to make a finding as to the relative levels of the interstate and intrastate rates, we submit that the effect of the decision is to write out of section 8(b) of the Administrative Procedure Act the requirement of findings and to leave the Interstate Commerce Commission free to interpret its statute in any way that it sees fit. The contention that the intrastate rates were higher than the interstate rates was the basic issue presented; substantial evidence was introduced to support it; and this evidence was uncontradicted, so that the Interstate Commerce Commission could not on the record have made a finding that the intrastate rates were on a lower level than the interstate rates. The effect of this decision, therefore, is to permit the Interstate Commerce Commission to increase intrastate rates without a finding on the basic issue before it for determination. The Administrative Procedure Act was adopted by Congress for the purpose of correcting the evils which had developed in the field of administrative law and to safeguard litigants against administrative abuse. If formalized findings wholly unrelated to the facts of the case are all that are required to support a decision of the Interstate Commerce Commission, a litigant before that Commission no longer has any protection against action taken in disregard of the requirements of law.

WHEREFORE, on the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the Court note probable jurisdiction and either place the cause on the docket for argument or remand the case to the District Court with instructions to pass upon the issues involved.

Respectfully submitted,

ALFRED T. MACFARLAND
Counsel for Plaintiff-Appellants State of Tennessee, Railroad and Public Utilities Commission of the State of Tennessee, and Hammond Fowler, Cayce Pentecost, and John C. Hammer, as members of and constituting the Railroad and Public Utilities Commission of Tennessee

JOSEPH C. SWIDLER
Counsel for Intervening Plaintiff-Appellant Tennessee Valley Authority

I, Joseph C. Swidler, counsel for the above-named Tennessee Valley Authority, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

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Joseph C. Swidler